(3)

No. 91-987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

v.

U.S. FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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Dated: April 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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REPLY BRIEF FOR PETITIONERS

While there is much in it that is fair argument, the Federal Respondents' Opposition contains some telling inaccuracies on matters that go to the heart of the issues presented by this case. In correcting these inaccuracies, San Francisco does not seek merely to set the record straight, but more importantly, to demonstrate that the two issues presented in the petition are of overriding public importance and require resolution by this Court.

1. Stated succinctly, the first question presented by San Francisco in its Petition is whether, absent a statute or regulation to the contrary, a state or local

government can be found in default under a grant where the finding of default is based upon a redetermination of a final adjudicatory factual determination made by the state or local government. For the very first time in the six-year history of this case, Respondents contend—without any citation to California law—that the Commission's April 15, 1986 decision denying a waiver for Burlington's proposed Q707 operations was not an adjudication (Opp. 19). Under controlling California law, the Commission's noticed hearing in which written and oral testimony was received, a formal record was prepared, and the Commission made factual findings based upon the record was an adjudication and the Commission's factual finding had binding and preclusive collateral estoppel effect. *People v. Sims*, 32 Cal. 3d 468, 477-479, 186 Cal. Rptr. 77, 82-85, 651 P.2d 321, 325-28 (1982).[1]

While not strictly necessary for our argument, Respondents are wrong when they assert (Opp. 19) that "the United States did not participate as a party in any of petitioner's proceedings." Indeed, the Opposition contradicts itself on this point. Earlier, Respondents rely on the findings of the ALJ that

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[1] Although conducted informally, any party was entitled to direct questions to any other testifying witness and numerous questions were asked of witnesses by individual Airport Commissioners. Moreover, the record was left open after the hearing for one week precisely in order to allow presentation of rebuttal evidence. See R.45 at Exhibit 12, p.42 (the transcript of the Commission hearing). Respondents are, thus, misleading when they state (Opp. 19) that "there was no opportunity *prior* to the hearing to obtain expert witness testimony for the purpose of rebutting it."

> 'the Commission essentially disregarded FAA's assurances as to the noise levels of the Q707' and instead 'elected to act on the basis of its own noise evaluation.' Pet. App. 87a. He ruled that the Commission's 'belief that [secondary] sources were entitled to greater credence than FAA's data and advice was not rational.' *Ibid.* Such unreasoning skepticism could not constitute a 'rational belief' that barring the Q707 would contribute to the Commission's goals. *Id.* at 84a-87a.

(Opp. 12).

Respondents can't have it both ways. Either the FAA participated in the Airports Commission's adjudicatory hearing and presented evidence as to the noise levels of the Q707 which (the FAA contends) the Commission should not have disregarded, or the FAA did not participate in the adjudicatory hearing and, thus, the Commission did not disregard FAA evidence of Q707 noise levels. In fact, the record is clear that the FAA did participate through written testimony submitted to the Commission which, although 12 pages in length, contained only general statements as to the noise levels of the Q707 without supporting data and did not provide the full weight, full thrust noise data that the Commission was seeking. R.45 at Exhibit 10.

Once the incorrect assertion that the Airports Commission did not conduct an adjudication (one in which the FAA participated) is swept aside, the true import of the federalism issue presented by this case becomes apparent: A federal agency is purporting to sanction a state or local agency, on the basis of the federal agency's redetermination of factual findings that had

been made by the state or local agency. Such a power would not only run roughshod over the parties to the state or local agency adjudication, but would represent an unwarranted intrusion on state sovereignty, one which was not clearly agreed to prior to entry into the grant.[2] While Congress undoubtedly has the power to give a federal agency such a power, it must do so in an unequivocal manner so that the state or local agency can make a knowledgeable decision whether to give up a measure of its sovereignty in return for the federal grant funds. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 24 (1981); *see also Grove City College v. Bell*, 465 U.S. 555, 575 (1984).

Since the FAA's determination of default turns on a review and redetermination *de novo* of the adjudicatory determinations of the Airports Commission, *inter alia*, as to the relative noise level of the Q707, a decision in favor of San Francisco would necessitate a reversal of the FAA Administrator's determination and remand with instructions that any further FAA proceedings not involve redetermination of the Airports Commission's adjudicatory determination.[3]

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[2] It bears emphasis that any party could have sought judicial review of the Commission's decision. Cal. Civ. Proc. Code § 1094.5 (1980). Any statutory or constitutional claims with respect to the Commission's decision could have been raised in state-court judicial review. *Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 629 (1986).

[3] To this day, because of a protective order entered by the ALJ over San Francisco's strenuous objections, neither the Airports Commission nor any officer or employee of the Commission has seen the Q707 noise data that "disproves" the Commission finding challenged by the FAA. Petitioners are, thus, in no po-

2. Respondents characterize this case (Opp. 20) as if it involved the issue whether the FAA had made a reasonable interpretation of 49 U.S.C. app. 2210(a)(1), the statutory provision which provides that airports receiving grants "be available for public use on fair and reasonable terms and without unjust discrimination." While the FAA could have independently construed 49 U.S.C. app. 2210(a)(1) and the resulting grant provision, it did not do so. Instead, the FAA conducted its default proceeding "as though this case were being brought before a district court and as though no grant agreement were in existence." App. 71a (Initial Decision of ALJ). The alleged grant breach was, thus, to be determined by "application of appropriate decisional law" with respect to airport proprietor noise abatement authority. App. 51a (Administrator's Decision and Final Order).

Once Respondent's characterization is corrected, it becomes apparent that the standards imposed by the Equal Protection Clause and the Commerce Clause are, indeed, the source of the applicable legal principles which will govern the lawfulness of San Francisco's 1978 Noise Abatement Regulation. The Equal Protection Clause and/or the Commerce Clause are the legal basis of the decisional law which, beginning with *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973), has governed airport proprietor noise abatement authority.

Respondents have been less than candid in failing to recognize the conflict that exists among the lower courts both in the legal standards being imposed upon

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sition to determine whether the FAA's factual redeterminations are correct.

airport proprietors and in the results that have been reached. There are, indeed, numerous lower court decisions, contrary to the decision below, that are supportive of San Francisco's position that its long-noticed deadline on the admission of additional noisy aircraft must be upheld if San Francisco possessed a rational or reasonable basis for concluding that the deadline would decrease the noise of airport operations. In *Western Airlines,* the court held "it was not unreasonable" of the airport proprietor to adopt a rule that prohibited non-stop flights to LaGuardia Airport in excess of 1,500 miles, except for an unlimited number of "grandfathered" operations from Denver to LaGuardia. *Western Air Lines v. Port Auth. of N.Y. & N.J.,* 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd,* 817 F.2d 222 (2d Cir. 1987), *cert. denied sub nom., Delta Air Lines v. Port Auth. of N.Y. & N.J.,* 485 U.S. 1006 (1988). Similarly, in *Alaska Airlines,* the Ninth Circuit stated that it was "rational" and, thus, consistent with both the Commerce Clause and the Equal Protection Clause, for Long Beach to impose numerical noise limits on scheduled air carriers, but not on general aviation, and to limit daily flights from the airport to 32 flights per day, regardless of the specific noise characteristics of those flights. *Alaska Airlines v. City of Long Beach,* 951 F.2d 977, 985-86 (9th Cir. 1991). *See, e.g., Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J.,* 727 F.2d 246, 251 (2d Cir. 1984) ("[T]he reasonable prospect of a beneficial effect is sufficient" to uphold the Port Authority's noise regulation); *Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100, 104, n.5 (9th Cir. 1981) (Airport proprietor should be allowed to enact noise ordinances "if it has rational belief that the ordinance will reduce the possibility of liability or en-

hance the quality of the city's human environment"); *Arrow Air, Inc. v. Port Auth. of N.Y. & N.J.*, 602 F. Supp. 314, 319-320 (S.D.N.Y. 1985) (reasonableness and discrimination determined based on standard in *City of New Orleans v. Dukes*, 427 U.S. 297 (1978)).

While Respondents can fairly dispute the legal standard being advocated by San Francisco on its merits, as they have throughout this proceeding, Respondents are unconvincing when they assert that the lower courts are not in conflict on the standards for review of airport proprietor noise abatement regulation. The conflicts do exist and this case presents an especially good record upon which to resolve an issue of considerable public importance that has divided the lower courts since the *City of Burbank* decision.

3. Despite the fact that Congress took pains, in a provision never mentioned by Respondents, not to affect "existing law with respect to airport noise or access restrictions by local authorities" or "any proposed airport noise or access regulation" in process as of October 1, 1990,[4] Respondents contend (Opp.

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[4] 49 U.S.C. app. 2153(h) provides:

> Except to the extent required by the application of the provisions of this section, nothing in this sub-title shall be deemed to eliminate, invalidate, or supersede—
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> (1) existing law with respect to airport noise or access restrictions by local authorities;
>
> (2) any proposed airport noise or access regulation at a general aviation airport where the airport proprietor has formally initiated a regulatory or legislative process on or

25) that the Airport Noise and Capacity Act of 1990 "has dramatically altered the substantive and procedural obligations of airport proprietors, air carriers, and the executive branch." In fact, the 1990 Act will have no effect whatsoever upon the noise abatement measures that were in effect at nearly 150 airports when the statute was adopted. Moreover, the 1990 Act, by its terms, has no effect whatsoever upon the substantive terms of future airport noise or access restrictions, which (like San Francisco's) will affect only Stage 2 aircraft. Indeed, as Respondents recognize, the 1990 Act imposes only certain limited procedural requirements on airport proprietors seeking to implement restrictions on Stage 2 aircraft (Opp. 23-24). While the 1990 Act does impose procedural and substantive requirements on proposed restrictions on Stage 3 aircraft, few if any such restrictions have ever been adopted and few are likely to be proposed during the remainder of this decade.

In sum, the 1990 Act effects no change in the substantive law applicable to all (as of this date) existing noise restrictions in the United States and the vast majority of noise restrictions that will be adopted by airport proprietors for years to come. More importantly, the 1990 Act is utterly irrelevant to the first question presented by the Petition, whether a state or local government, where the statutes and regulations are silent on the issue, subjects its otherwise final adjudicatory determinations to *de novo* review and redetermination by a federal agency that admin-

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before October 1, 1990; and

(3) the authority of the Secretary to seek and obtain such legal remedies as the Secretary considers appropriate, including injunctive relief.

isters a grant program. The 1990 Act never addresses that issue. For all these reasons, the decision whether to grant certiorari should be unaffected by the enactment of the 1990 Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: April 1992